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Government Affairs Director

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July 16, 1999

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S. W. – Room TWB-204
Washington, D. C. 20554

Re: *Ex parte*, CC Docket No. 98-1, State of Minnesota Petition For Declaratory Ruling Concerning Access To Freeway Rights-Of-Way Under Section 253 Of The Telecommunications Act Of 1996

Dear Ms. Roman Salas:

The information attached to this Notice was delivered to David Kirschner of the Common Carrier Bureau's Policy and Program Planning Division on July 15, 1999. Please include a copy of this Notice in the record of the above-captioned proceeding.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

F S Simone

ATTACHMENTS

cc: D. Kirschner

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# Roadblocks to Competition

## Municipalities and Legitimate Police Powers

By Meredith R. Harris

The Telecommunications Act of 1996[1] directly contemplates and encourages the entry of competitive local telecommunications companies into markets nationwide. In order for a new facilities-based telecommunications company to enter and compete effectively it must be able to expeditiously build its local network. Unfortunately, many municipalities present roadblocks to competition by attempting to require that competitive local telecommunications companies pay prohibitive and sometimes illegal fees before they are allowed to use the public right-of-way.[2]

When a telecommunications company seeks to use a public right-of-way, a municipality will often insist the company execute a "franchise agreement." Before acquiescing and negotiating the specific terms and conditions of a "franchise agreement," a prudent company should thoroughly evaluate its rights and the municipality's authority vis-a-vis public right-of-way. Such an evaluation requires careful examination of how the laws of the particular state endow and distribute four specific governmental powers relating to uses of public right-of-way.

First, the company must determine which governmental entity in the state is empowered by state law to authorize the company to conduct its business in the state. In precise legal terminology, this is "franchise authority." Second, the company must determine which governmental entity is empowered by relevant state law to authorize use of the public right-of-way for the conduct of business. This is called "occupancy right." Third, the company must evaluate whether the municipality has the right to charge a fee for use of the public right-of-way, and the exact parameters of the municipality's rights in this regard. This relates to, but is not necessarily limited to, taxing powers in the state. Finally, the company should determine the exact powers the municipality is granted with respect to regulatory control over the time, place and manner of entry to the public right-of-way. This is the police power that a municipality possesses.

In addition, even where a municipality is allowed by state law to exercise certain of these powers, the new

Federal Telecommunications Act of 1996[3] establishes very specific parameters for municipalities and states with respect to authority over public right-of-way.[4]

## I. Power to Grant Franchise Authority

Does the municipality have the right to grant a franchise? Contrary to the common use of the term, a "franchise" is a right to conduct business in a given geographic area.[5] A municipality is usually not vested with the authority to regulate telecommunications services and operations, and therefore does not technically possess the power to grant a telecommunications franchise. State laws typically grant such authority to the state public service commission, not municipalities.[7] Additionally, the new Federal legislation provides that no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications service.[8] Thus, attempts to regulate in areas reserved to the state public service commission (or the Federal Communications Commission) would impede the offering of new telecommunications services in a manner directly contrary to federal policy and modern standards of regulation, and would add layers of overregulation which conflict with, and are preempted by, federal[9] and state laws.[10] By the same token, provisions of municipal agreements that pertain to regulation or limitation of business activities, or that require disclosure of information about the network are also typically beyond the scope of powers reserved to municipalities. This includes information about buildings served, customers, business plans, objectives and other business related issues, except in-so-far as such information may be required to enable the municipality to exercise its legitimate police powers with respect to public right-of- way.

## II. Power to Grant Right-of-Use

As previously explained, the power to grant a "right of use" is the proprietary power to authorize use of, and control access to, public right-of-way for the conduct of business. This is the power which is most often thought of when people discuss the issue of "franchises" and right- of-way. Here also, however, municipalities are often limited or even preempted from exercising such power.[11] In many states, statute or case law expressly establish that a municipality has no authority to arbitrarily exclude a telephone company or public utility, as the case may be, from *using* the public right-of-way.[12] Courts have held that the public ways are only held in trust by municipalities for the public, and that municipalities have only regulatory, not proprietary, power over the public ways.[13] Further, as noted previously, state law may grant to telecommunications companies both a franchise to conduct business, as well as the right to occupy certain public right-of-way by virtue of receiving a certificate of operating authority, or equivalent, from the state public service commission[14]

## III. Police Powers Over Public Right-of-Way

In most cases, the authority of the municipality over right-of-way is limited solely to the municipality's police power to regulate the time, manner and place of entry to such right-of-way.[15] These are the appropriate police powers of the municipality. To accomplish this, the municipality should merely grant a permit or license and not a franchise. In addition, if one of the purposes of the process is to control access to the right-of-way, and to limit disruption to the municipality, the purpose is served by applying the process only to those providers who actually construct infrastructure. Thus, if one company merely uses another company's network through licensing or service agreements, and imposes no burden upon the municipality, nor physically intrudes upon the municipality's right-of-way, approval by the municipality should not be necessary.

There is no logical way that a fee based upon a percentage of a company's gross revenue can be reasonably connected to the costs imposed by that company by its presence in a public right-of-way.

## IV. Power to Charge Fees

Regardless of what powers a municipality might actually possess, most municipalities desire to charge telecommunications companies in connection with use of public right-of-way. Cities may attempt to charge excessive fees in order to raise revenue.[16] In the past, companies have acquiesced to paying such fees in order to avoid timely and expensive litigation. In addition, a company may not wish to jeopardize its relationship with a municipality by challenging the fees. However, the impacts such fees may have on the economics of a competitive business may in some instances justify the risks of litigation. For instance, if the fee is a fixed amount per linear foot of right-of-way, the additional capital cost may prevent a company from bringing competition to areas where it does not currently exist. Additionally, if imposed after the fact, such a fee creates an unanticipated penalty on a company that has substantial fiber-optic network already in existence. Cities often try to draw an analogy to the cable television industry. However, such a comparison is defective because municipalities had the power to grant franchised facilities-based monopolies to cable companies, which was not the case in the telecommunications industry.[17]

In order to avoid paying excessive fees related to a municipality's lawful authority, a telecommunications carrier must explore whether the municipality is trying to impose an illegal tax.[18] In most cases the authority to institute a tax is vested with the state legislature or state constitution. Case law often exists further defining and developing this position.[19] Critically, both federal and state courts have supported the principle that municipalities may not use their police powers over public right-of-way to generate revenue.20 Even if a municipality can exact a fee or has the authority to levy a tax, such right may be limited. A user fee that is calculated not just to recover a cost imposed on the municipality or its residents, but to generate revenue, is by definition a tax.[21] States generally follow the rule that a regulatory fee such as a licensing fee which is disproportionate to the cost of issuing the license and the regulation of the business licensed is a tax.[22]

Where a municipality's powers over public right-of-way are limited to police powers, the municipality is essentially limited to charging fees which can be demonstrated to directly cover the costs of administering the right-of-way.[23] There is no logical way that a fee based upon a percentage of a company's gross revenue can be reasonably connected to the costs imposed by that company by its presence in a public right-of-way. This is especially true when the definition of gross revenue contained is so expansive that it covers revenue generated outside of the municipality. In dealing with a municipality, a company should ask for proof that the fees proposed by the municipality are in fact designed to cover the costs of administration, and the municipality's justification for the fee. In evaluating any agreement proposed by a municipality, a company must look for key wording; e.g. if the document refers to "a valuable property right" and not the recoupment of any cost incurred by the municipality, it is probably overreaching. In addition, other expenses, such as bonds, indemnities, and other fees that may be designed to cover additional costs. Clearly the requirement that a company provide in-kind services to the municipality does not cover the reasonable cost of administering the right-of-way.

### V. Federal Legislation

The new Federal legislation provides a uniform pro competitive national policy. It provides that no state or local government can prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications service." Each municipality can continue to exercise its legitimate police powers over the public right-of-way, but it must do so on a competitively neutral basis." A municipality may charge fair and reasonable compensation which must be competitively neutral and non-discriminatory, and which must be disclosed by the municipality." Such compensation may be further limited by state law (ie. whether the municipality has the right to levy a tax). Unfortunately, some municipalities have misinterpreted Section 253 (c) of the Telecommunications Act to give them authority to charge fees that they are not permitted to charge under their state law. In addition, The Federal legislation preempts inconsistent and incompatible existing state laws and renders void those provisions in existing agreements that require the payment of discriminatory fees. Companies must consider how they will correct existing agreements that are inconsistent with the Federal legislation. In addition, the new Federal law provides that the federal courts shall be a forum for disputes and gives the Federal Communications Commission preemptory rights."

Municipalities are likely to dispute the meaning of the new Federal standards, especially in regard to the meaning of the term "competitively neutral". "Competitively neutral" establishes a higher standard than just "non-discriminatory treatment" or "equal treatment." Presumably, if Congress had intended to require only "equal treatment", the legislation would have used those words, or would have used the term "neutral", without the modifier "competitively." The term is reflective of the underlying intent of the new Federal standard to foster the entry of competitors, the development of competition and the deployment of infrastructure. A policy which is merely nondiscriminatory and provides for equal treatment, may not satisfy this higher standard. If on the surface a municipality treats all companies equally, but the result is that it is not economically feasible for a competitor to enter the marketplace, then the municipality is probably in violation of the new Federal standard, as made evident by the following examples.

a. Example: If a municipality institutes a "nondiscriminatory" fee of one cent per foot for copper wire cables, and three cents per foot for fiber optic cable, such a regime would not be "competitively neutral" since it would favor the incumbent LECs (which have substantial embedded copper wire infrastructures).

b. Example: If a municipality decides that aerial attachments are unsightly and that all newcomers must install their fiber underground, this could also be in violation of the new Federal standard to the extent it placed new entrants at a material disadvantage vis-a-vis the incumbents.

c. Example: A very high one-time charge would also not be competitively neutral since it would also, obviously, favor the incumbent LEC.

### VI. Non-Discrimination

Municipalities charging fees should do so on a nondiscriminatory basis." All local exchange carriers, including the incumbent, should be subject to those fees, which should recover only the actual cost of providing access to public right-of-way. One should check into how the incumbent local provider is treated. The federal government and some states have passed legislation that requires that any fees or assessments shall be on a nondiscriminatory basis, and shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right of ways, easements or public places used by the provider.

### VII. Negotiation Goals

A "permit" should be used instead of a "franchise" to standardize and make efficient the process by which telecommunications common carriers gain access to the public right-of-way. A permit, license or ordinance of general application would accomplish this goal. Such permit, etc. should ensure the recovery of costs incurred by the municipality, mitigate the impact of industry growth upon the municipality's infrastructure, and ensure that the policy of the municipality has a competitively neutral impact upon all telecommunications providers. A uniform competitively neutral process is the best way to promote the development of the information superhighway.

### VIII. The Agreement

Since municipalities do not have jurisdiction over the regulation of telecommunications services, the word "franchise" should not be used to denote the use of the public right-of-way by telecommunications carriers. The state law where the municipality is located will determine whether to title the document a "Use Agreement," "Consent Agreement," "Permit," or " License." If a municipality has the right to levy a tax, a limited gross revenue definition in the agreement will mitigate the fee. It is important to include language that states that new laws concerning the right-of-way can render void existing provisions and that the company does not waive its rights to challenge the validity of the provisions contained in the agreement.

### Conclusion

The main point to come away with is that telecommunication companies are not negotiating a municipal franchise, but a permit, license or ordinance of general application, that governs how, when and where telecommunication companies can enter the public right-of-way, not whether they can enter, or how they can use it. Only then can telecommunications companies provide their services on a level playing field in a competitive marketplace. X

*Meredith Harris is vice president and assistant general counsel of Teleport Communications Group Inc. She can be reached at (718) 355 2000.*

Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996).

See Geselbracht and Williams, Information Superhighway is Beset by Local Fees, The National Law Jrnl., Mar. 13, 1995, at B12, col. 1.

Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996).

47 U.S.C. sec. 253(a)

A special privilege conferred by government on individual or corporation to operate telephone service in a community. See, e.g., Black's Law Dictionary 592 (5th ed. 1979).

Indeed, a telecommunications company usually seeks authority to provide services statewide and, therefore, a municipality should not be able to restrict a company's ability to provide statewide services. A municipality's ability to regulate is limited to issues of local rather than statewide concern. "A telephone company which is running a fiber optic cable across the State and through various municipalities is not a matter of purely local concern and is an issue of statewide concern." American Tel & Tel. Co. v. Arlington Heights, 156 Ill. 2d 399, 411, (1993). Further, as noted by the 7th U.S. Circuit Court of Appeals, "To run a cable across the state a telephone company might have to cross a hundred municipal boundaries, and at each one (if a municipality had the right to grant a franchise) it could be held up for a monopoly toll, as if (the) municipalities were so many little medieval German principalities." Diginet Inc. v. Western Union ATS Inc., 958 F. 2d 1388, 1400 (7th Cir. 1992) (Posner, J.).

See, e.g., Cal. Pub. Util. Code sec. 7901 (1951).

47 U.S.C. sec 253(a).

47 U.S.C. sec 253(d)

See, e.g., 1995 Fla. Sess. Law Serv. Cha. 95-403(5), amending Fla. Stat. Ann. 364.01

It is universally recognized that a state has the right to control all public streets and highways, and except in so far as that control has been relinquished to municipalities by the state, either by the state constitution or by legislative act, it remains with the state. See Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 116 P. 557, 562 (1911).

American Tel. & Tel. Co. v. Arlington Heights, 216 Ill. App. 3d 471, 483 (1st Dist. 1991) aff'd, 156 Ill. 2d 399 (1993).

American Tel. & Tel. Co. v. Arlington Heights, 156 Ill. 2d 399, 409 (1993).

See, e.g., Cal. Pub. Util. Code sec. 7901 (1951).

In the Matter of Classic Telephone Inc., FCC 96-397, CCBPol 96-10 (September 30, 1996). A municipality cannot, under the guise of its police power, impose a license fee for revenue purposes. See City of Chicago Heights v. Public Service Co., 408 Ill. 428, 94 N.E. 2d 306 (1950).

See Village of Lombard v. Illinois Bell Tel. Co., 405 Ill. 209, 90 N.E. 2d 105 (1950) (Village, acting with no grant of authority by the General Assembly, was prohibited from exacting a rental charge for the use of public streets as a means of raising revenue).

Municipalities may charge up to 5percent of gross revenues pursuant to The Cable Communications Policy Act of 1984. 47 U.S.C. sec. 541 (a)(1). Telecommunications providers may now provide video programming. 47 U.S.C. sec. 533(b).

See American Tel. & Tel. Co. v. Arlington Heights, 156 Ill. 2d at 408 (municipalities do not have the authority to hold public streets hostage as a means of raising revenue. Regardless of the name given to a particular method of revenue enhancement, whether it is called a franchise, a rental fee or a tax, it is, in essence, an illegal toll).

A municipality may not tax without explicit authority from the state. Diginet Inc. v. Western Union ATS Inc., 958 F.2d 1388, 1399 (7th Cir. Ill. 1992), reh'g. en banc, denied, No. 91-1658 (7th Cir. Ill. 1992), summ. judgment granted, partial summ. judgment denied 845 F. Supp. 1234 (N.D. Ill. 1993).

In the exercise of its police power, a municipality is limited to such charges as will bear some reasonable relation to the additional burdens imposed upon the municipality by the business and necessary expenses involved in police supervision. See Chicago Heights v. Western Union Tel. Co., 408 Ill. 428, 94 N.E. 2d 306 (1950). See also, Diginet Inc. v. Western Union ATS Inc., 845 F. Supp. 1234 (N.D. Ill. 1993).

Diginet Inc. v. Western Union ATS Inc., 958 F. 2d at 1399.

Id.

Id.

47 U.S.C. sec 253(a). See In the Matter of Classic Telephone Inc., FCC 96-397 at 14.

47 U.S.C. sec. 253(c). See In the Matter of Classic Telephone Inc., FCC 96-397 at 16, 22.

Id.

47 U.S.C. sec. 253(d).

47 U.S.C. sec. 253(d).

47 U.S.C. sec. 253(c).

See, e.g., Tex. Rev. Civ. Stat. Ann. art. 1446c-0, sec. 3.2565 (1995) and Mich. Comp. Laws sec. 484.2251-484.2253 (1995).

**B. Federal Decisions**

The following discussion summarizes recent decisions regarding section 253.

1. BellSouth Telecommunications, Inc. v. City of Coral Springs, Florida, No. 97-7010 (S.D. Fl. Jan. 25, 1999)(any part of a city ordinance not dealing directly with managing the rights-of-way is preempted by section 253). Florida law limits municipal fees that could be assessed for rights-of-way occupancy to one percent of gross receipts of recurring local service revenue for services provided within city limits. It forbids cities from exercising regulatory control over telecommunications companies regarding their operations, systems, qualifications, services, service quality, service territory, and pricing. Relying on AT&T Communications of the Southwest, Inc. v. City of Dallas, supra, the court found the city could only regulate use of rights-of-way and could collect no more than the statutory one percent fee on revenues from local recurring service permitted by state law.

2. Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, No. 98-12531, 199 U.S.Dist. LEXIS 997 (D.Mass. Jan. 27, 1999). The court provided its views on pleading and proof requirements for certain types of claims. It held that to establish a section 1983 claim (1983 creates a claim for damages for denying the plaintiff its federal rights), a party must assert a violation of a federal right, not simply a violation of federal law. To establish an enforceable federal right, one must show that (a) Congress intended the statutory provision to benefit the plaintiff; (b) the right is not so vague and amorphous that enforcement would strain judicial competence; and (c) the statute unambiguously

imposes a binding obligation on a governmental entity.

The court stated that it appeared section 253(c) would not pass this test, since it imposed "no mandatory obligation on any state or municipality." Even if it did, the court stated that if a defendant could demonstrate Congress had foreclosed a section 1983 (violation of a federal right) remedy by adopting a "comprehensive enforcement scheme that is incompatible with individual enforcement of §1983," then a section 1983 claim would fail. Section 253 was such a remedial scheme. Nevertheless, the court found that one can still plead a Supremacy Clause claim to challenge actions arising to a prohibition of service under section 253(a).

As to whether conduct covered by section 253(c) could form the basis for a claim under Section 253(a), the court stated: The current complaint does not allege that conduct by §253(c) violated §253(a), but if this were only an issue of pleading, an amendment to the complaint could be permitted. It may be, however, that Section 253(c) expresses an intent that 253(a) not operate to preempt local regulation of municipalities' rights-of-way under any circumstances. This is a question that will require more analysis to decide, perhaps in the context of a future motion to dismiss. Id. at 30 (emphasis added). The court then reserved the question of whether one might plead section 253(c) type conduct as a distinct section 253(a) violation and stated it would consider it only in the context of a motion to dismiss.

The court also noted that it appeared that the term "competitive neutral" in section 253(c) did not apply to "management" but to the "fair and reasonable compensation" prong of section 253(c), while the "nondiscrimination" prong applied only to "management."

3. <u>AT&T Communications of the Southwest, Inc. v. City of Dallas</u>, 8 F.Supp.2d 582 (N.D.Tex.1998)(city does not have authority under either federal or state law to impose franchise conditions or fees on telecommunications service providers unrelated to rights-of-way use), <u>summary judgment granted</u>, No. 3:98-CV-0003-R (May 17, 1999).

AT&T had a certificate of operating authority (COA) from the PUC to provide local service in Dallas. It planned to introduce a new service known as AT&T Digital Link (ADL). AT&T would primarily use Southwestern Bell facilities to provide the service. With some customers, however, it needed to use five miles of its own cable which was located in the rights-of-way. The facilities had previously been used by AT&T to provide long distance.

AT&T sought Dallas's permission to use these facilities for this new service pursuant to its existing ordinance. AT&T offered to pay compensation for the use of the rights-of-way as required by the ordinance and a fee of four percent of gross revenues derived from ADL traffic carried over these facilities. Dallas refused, however, insisting that AT&T obtain a franchise agreement covering <u>all</u> of AT&T's telephone business in Dallas.

Dallas's franchise application contained extensive regulatory provisions. Among other things, it required AT&T to provide detailed ownership and control information, character qualifications, information relating to present and past telecommunications systems holdings, and other financial information such as financial projections through 2007. Much of the required information had been reviewed by the PUC or exceeded what is required by the PUC to operate in Texas.

AT&T filed suit alleging various state and federal violations, including a violation of section 253(a). The city moved to dismiss based on a lack of subject matter jurisdiction citing the failure to exhaust remedies before the FCC. The city also relied on the doctrine of primary jurisdiction. The court rejected both arguments. It stated that exhaustion was required only when the original claim could have been brought solely before an administrative agency; there was no indication that Congress had intended to grant the FCC exclusive jurisdiction over these types of claims. The court rejected the primary jurisdiction argument finding that the considerations, which favored FCC input on matters within its special competence or expertise, were lacking. The court stated that (1) it was just as well equipped as the FCC to conduct a statutory analysis of the FTA, (2) no special policy determinations or input from the FCC were needed, (3) the FCC had already set out its policy positions on a number of issues raised in the case, and (4) referral to the FCC would lead to lengthy delay which would be adverse to AT&T's significant interest in obtaining a swift adjudication. This interest also outweighed any benefits that might be derived from soliciting the FCC's views on the issues before the court.

The court granted a preliminary injunction. It found several aspects of the ordinance to be contrary to the FTA and PURA. The court stated that federal law limited Dallas's regulatory authority to two narrow areas: management of rights-of-way and the right to fees for use. Absent a specific delegation by the state (of which there was none here except as to rights-of-way management), cities did not have the more general authority to regulate to protect public safety or welfare. The court stated that Congress' intent in passing section 253 was to remove all barriers to entry in the provision of telecommunications service by preempting any state or local requirement that "directly or indirectly" prohibited market entry. It also found that the FCC's interpretations of the limitations imposed by section 253 were consistent with the limitations imposed by PURA.

The court found that FTA and PURA permitted Texas cities to require franchises from COA holders who "used" rights-of-way. Municipal discretion in this area, however, was limited. A franchise grant can only be conditioned on a provider's agreement to comply with a city's reasonable regulations regarding "use" of rights-of-way and payment of fees for such "use". Dallas did not have power to require a comprehensive application or to consider such factors as the company's technical and organizational qualifications to offer new services. These are matters that are both reserved to the PUC and preempted by PURA.

Neither the FTA nor PURA provides Dallas the authority to place conditions on a telecommunications service provider's franchise other than those related to use of rights-of-way. Many of Dallas's requirements, such as having to submit a wide range of financial information, maintenance of detailed records subject to the city's approval, a requirement to provide "ubiquitous service," and the dedication of duct and fiber to the City's exclusive use were unrelated to use of the city's rights-of-way and, therefore, beyond the scope of the city's authority.

Finally, the court found that the city did not have the power to impose fees except as compensation for "use" of the rights-of-way. Dallas was seeking four percent of gross revenues from all of AT&T's activities within the city, regardless of whether fees were related to use of rights-of-way. The court noted, among other things, that the revenue base included 25 categories of revenue. The revenue base even included long distance, which was exempted from the scope of local franchise authority by Texas law. The court also noted that requiring AT&T to pay fees on revenues from the resale of Southwestern Bell services would be tantamount to double billing, stating that AT&T already paid Southwestern Bell on account of its pro-rata share of franchise fees that Southwestern Bell, in turn, paid to Dallas for rights-of-way use. The court concluded its discussion by holding that any fee that was not based on use of the rights-of-way, constituted an economic barrier to entry under section 253(a).

The city tried to justify its actions as an attempt to comply with the "competitively neutral and nondiscriminatory" requirements of section 253(c) stating that what was being offered to AT&T was no different that what was offered to every other provider. The court stated that because some might have agreed to a preempted ordinance, others should not have to. Competitive neutrality did not require that cities treat all providers identically or that the city is required to ignore significant distinctions among them. Exact parity is not required. With regard to compensation, the court did state that different burdens on the rights-of-way might warrant different fees.

On May 1, 1999, the court granted summary judgment in favor of AT&T. Noting that this case involved express preemption by section 253, the court found that the city could not impose its form franchise agreement on AT&T. It reiterated its prior holding that the form franchise is unlawful, because it sought to impose on AT&T conditions unrelated to use of the rights-of-way, e.g., disclosure of detailed financial and operational information, dedication of fiber and conduit for city's free and exclusive use, detailed audits, payment of four percent of all revenues from whatever source, etc. Since these conditions are unrelated to management of the rights-of-way and fair and reasonable compensation for use of rights-of-way and, they are not covered by section 253(c). The court rejected the city's argument that an ordinance would be preempted under section 253 only if state and local requirements fall outside of section 253(c) <u>and</u> have the prohibitory effect under section 253(a). The court also rejected the city's alternative argument that even if the franchise requirement is not within section 253(c), summary judgment must be denied, because AT&T had presented no evidence of a prohibitory effect. The city had argued that evidence of the ordinance being burdensome or costly did not mean it was prohibitive within the meaning of section 253(a). The court also rejected this argument noting that there was adequate evidence of prohibitive effect, because AT&T would be subject to prosecution if it decided not to comply with the ordinance. This was enough of a prohibitory effect.

The court also found the city's requirements were preempted by state law. The city's regulatory power was limited under state law to management and compensation for use. Except for these limited powers, which had been exceeded by Dallas in this case, exclusive jurisdiction to regulate fell to the PUC.

4. AT&T Communications of the Southwest, Inc. v. City of Dallas, No. CA 3-98-CV-003-R, 1998 WL 386168 (N.D. Tex. July 7, 1998)(non-facilities based provider not subject to Dallas's franchising authority). The court granted a preliminary injunction in favor of another plaintiff in the case, Teligent, who was a fixed wireless provider with facilities located on private property. To the extent Teligent needed conduit, Teligent could simply lease it from another carrier like Southwestern Bell or GTE. ("Use" to the court meant physical occupation of the rights-of-way which did not include the wireless services and the lease of facilities from an ILEC.)

On May 1, 1999, the court granted Teligent's motion for summary judgment holding that since Teligent did not use the rights-of-way, it could not be subjected to the franchise requirement. Also, since Teligent did not "use" the rights-of-way, the "safe harbor" provided by section 253(c) did not apply and was irrelevant. The court also stated that Teligent had provided sufficient evidence of a section 253(a) prohibitive effect, i.e., it could not offer 911 service unless it agreed to a franchise. Without 911, it could not enter the market under its COA. Thus, there was a prohibition under section 253(a).

5. City of Abilene v. FCC, 164 F.3d 49 (D.C. Cir. 1999)(state may prohibit municipalities from providing telecommunications service). Texas law prohibited municipalities from providing telecommunications. Abilene wanted to provide telecommunications service, believing that the local provider was unable to provide the kind of services its residents needed, e.g., "two-way audio, video, and data transmission capabilities." The city filed a section 253(d) petition. It was

denied by the FCC. The city appealed to the D.C. Circuit arguing that cities were protected entities under section 253(a) and that state law barring their provision of telecommunications service was invalid.

The court upheld the FCC's decision finding that the statutory scheme set forth in section 253 did not justify federal interference with a state's regulation of its own political subdivisions. The court held that section 253(a) could only be construed to affect areas of state sovereignty where Congress clearly had indicated its intent to do so. "To claim... section 253(a) bars Texas from limiting the entry of its municipalities into the telecommunications business is to claim that Congress altered the state's governmental structure... [and] courts should not simply infer this sort of congressional intrusion."

6. City of Chattanooga v. BellSouth, 1997 US Dist. LEXIS 17458 (E.D.Tenn. Oct. 24, 1997)(five percent gross receipts fee constitutes an unlawful state tax), remanded, 1 F.Supp.2d 809 (1998)(federal court has no jurisdiction under the Tax Injunction Act to hear unlawful state tax claim). Chattanooga's ordinance required providers who wanted to install facilities on poles and in conduit to pay 5% of gross revenues from services provided within the city. The city originally sued in state court. The defendants removed the case to federal court. The district court found the fee to be an unauthorized tax under state law and rejected the city's argument that it had the police power to impose the fee. The city moved to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) claiming the Tax Injunction Act, 28 U.S.C. §1341 deprived the court of subject matter jurisdiction. The court agreed, remanding to state court but reiterated its prior

holding that the fee was an unlawful state tax. A state court later held the fees to constitute unlawful taxation under state law.

7. AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F. Supp. 928 (W.D.Tex 1997)(city interest in regulating telecommunications service provider limited to management and compensation for use, an interest not implicated by non-facilities based providers).

AT&T sought to enter the Austin market by reselling Southwestern Bell (SWB) services as well as by rebundling UNE capabilities. AT&T, according to the court, did not intend to "install, operate, maintain, or repair any telecommunications in the public rights-of-way." The city passed an ordinance requiring providers like AT&T to obtain consent to provide service within the city. Consent was conditioned on payment of franchise fees for use and occupancy of the public rights-of-way and other requirements such as the disclosure of detailed financial and organizational information, SEC filings, and the like. This information duplicated or exceeded that required and considered by the PUC when it had granted AT&T's COA application. Operating without approval subjected providers to criminal sanctions.

AT&T brought section 1983 (violation of a federal right), Supremacy Clause, equal protection and due process, and PURA 95 claims. The city moved to dismiss the section 253(c) claim. Examining the same legislative history and statutory language discussed in GST Tucson Lightwave, Inc. v. City of Tucson, the court found an implied section 253(c) claim and denied the city's motion to dismiss. TCG Detroit v. City of Dearborn, 977 F. Supp. 836 (E.D.Mich.1997).

Austin initially raised exhaustion/exclusive jurisdiction and primary jurisdiction arguments, both of which the court rejected. As to the exclusive jurisdiction argument, the court stated that nothing in section 253(d) suggested the FCC was to have exclusive jurisdiction over preemption claims. Referral to the FCC under the primary jurisdiction doctrine was also inappropriate because (a) the issue here involved straightforward statutory construction which ultimately rests with the judiciary; (b) referral to the FCC would result in a lengthy delay; and (c) section 253(d) preemption was "arguably" only a mechanism by which the FCC on its own accord could raise preemption issues. The court held that preemption claims were clearly within the jurisdiction and competence of the judiciary.

In granting preliminary injunctive relief, the Court found that the threat alone of criminal sanctions and fines for failure to obtain consent would amount to a prohibition within the meaning of section 253(a). Examining section 253(b), the court found nothing in Texas law, including PURA 95, provided the city with the authority to impose the kind of regulations it sought to impose over a non-facilities-based provider like AT&T.

Final judgment was granted in favor of AT&T. Id., No. 97-CA-532 (W.D.Tex. filed Jun. 4, 1998). In post-trial briefs, the city raised the Tax Injunction Act as a jurisdictional bar. The court stated that if these fees were in fact taxes, they would appear to violate Texas law which bars municipalities from imposing occupation and privilege taxes on telecommunications providers. The court found no jurisdictional bar citing Pendleton v. Heard, 824 F.2d 448, 451-52 (5th

Cir.1987)(courts must look to the primary purpose of the lawsuit when determining whether the case falls within the scope of the Tax Injunction Act). The court found the issues in the case had nothing to do with the appropriateness of the fees required by the ordinance. The court stated the Austin case involved a challenge to an attempt by the City of Austin "to impose onerous regulatory requirements on non-facilities based providers and to force such entities to obtain municipal consent before providing local telephone service--under the threat of criminal sanctions and fines for non-compliance--when the City has no authority to do so under federal and state law."

8. TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998)(city may charge rent for use of rights-of-way but may not require franchise of ILEC with statewide franchise), appeal docketed, No. 98-2034 (6th Cir. Sept. 9, 1998).

TCG was licensed by the Michigan PSC to provide local service. It entered into an agreement with Detroit Edison to install fiber in ducts with lease back to TCG. When the city was informed of this activity, TCG had already installed some seven of twenty-seven miles of cable. The city objected, stating TCG had to obtain a franchise before entering the public rights-of-way to install cable. A lengthy dispute and negotiation followed. A draft franchise agreement provided that TCG would pay a 4% franchise fee of TCG's gross receipts, a $50,000 one time payment in lieu of providing fiber strands, and up to $2500 of the management costs incurred by Dearborn in connection with granting the franchise. Michigan then passed its own telecommunications act. The law limited municipal recovery to "fixed and variable costs" incurred in granting permits and maintaining rights-of-way. Michigan law also required that fees be charged on a nondiscriminatory basis. The Federal Telecommunications Act of 1996 was also passed. The city refused to modify its franchise and fee requirements. TCG then sued claiming Dearborn had violated a number of state and federal laws, including the Michigan Telecommunications Act and sections 253(a) and (c) of the Federal Act. In particular, TCG Detroit alleged that Dearborn's Ordinance is unlawfully prohibitory under §253(a) of the FTA, and contains requirements far in excess of the City's limited authority under §253(c); that the Ordinance is not competitively neutral and nondiscriminatory as applied to TCG Detroit, and is not being applied against Ameritech, the dominant local telecommunications provider; and that the Ordinance impermissibly seeks to exact compensation far in excess of the City's costs. Dearborn, in turn, filed a third party complaint against Ameritech, in part, because TCG had challenged the disparate treatment of Ameritech. The court, on its own motion, dismissed TCG's state claims stating they should be resolved in state court.

The city moved to dismiss the section 253(c) claim. Examining the same legislative history and statutory language discussed in GST Tucson Lightwave, Inc. v. City of Tucson, the court found an implied section 253(c) claim and denied the city's motion to dismiss. TCG Detroit v. City of Dearborn, 977 F. Supp. 836 (E.D.Mich.1997).

The parties subsequently filed cross-motions for summary judgment. Regarding section 253(a), TCG claimed that the ordinance constituted a prohibition to entry. TCG also argued that the compensation violated section

253(c), because it was not "fair and reasonable" and it was not competitively neutral or nondiscriminatory. TCG argued that, as a matter of federal law, to be fair and reasonable, fees should be cost-based. To be competitively neutral and nondiscriminatory, TCG argued that ILECs and CLECs should be subject to the same agreements and fees.

The court granted summary judgment in favor of the city. The court believed that "fair and reasonable" under section 253(c) depended on the facts and circumstances. Citing City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893), the court held that cities had a right to seek compensation in the form of rent from users of their rights-of-way (the Michigan Telecommunications Act notwithstanding). With regard to TCG's competitive non-neutrality and discrimination arguments, the court stated that the claims had no merit because Dearborn had been attempting to impose a similar ordinance on Ameritech. TCG argued, however, there was also discrimination because the terms of the agreements were not identical. To this, the court replied that terms need not be identical. In fashioning the terms of rights-of-way occupancy, cities may consider size of the provider, the contemplated use of the rights-of-way, space available, and the like. Comparable, not identical, agreements are required. And, fees and rates need not be the same. The court rejected TCG's section 253(a) claim stating that since the regulation was "neither discriminatory nor unreasonable," there was no section 253(a) entry prohibition. The court also rejected Dearborn's third party claim against Ameritech. Implicitly finding no meritorious section 253(c) claim arising out of the disparate treatment of ILEC and CLEC, the court held that Dearborn could not subject Ameritech to regulation or fees because of its existing statewide franchise. All rulings are on appeal to the 6th Circuit. Since the ruling contained many errors of law and fact, TCG is confident it will in the Circuit Court of Appeals.

TCG's arguments before the trial and appellate courts are substantially the same. First, the City of St. Louis decision concerned whether a city has the power to assess any charge or is prevented from doing so by federal law. It does not address the question of whether a fee is excessive or unreasonable. TCG's argument that "fair and reasonable compensation" under section 253(c) requires cost-based fees as a matter of federal law is based on three considerations.(such arguments were made prior to the finding that "fair and reasonable" means the cost of administering the rights-of-way as held in Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland). First, the principal meaning of "compensation" is to make one whole for costs or expenses incurred. Second, section 253(c) only permits cities to recover compensation "for use" of rights-of-way. These words would be meaningless without a linkage between the amount of compensation and the burden generated by such use. Third, decisions prior to passage of the FTA, such as Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994), have already established that charges for use of public facilities must be cost-based to satisfy distinct and affirmative "reasonableness" requirements imposed by federal law. These reasonableness requirements are similar to those in section 253(c). (In Northwest, the court found that the federal "reasonable" limitation on head taxes which cities could assess on airline passengers under the Anti-Head Tax Act meant that fees must (1) be based on a fair approximation of costs, (2) not be excessive in relation to the benefits conferred, and (3) not discriminate against interstate commerce.) As to section 253(c)'s competitive neutrality and discrimination requirements, TCG argues that treating ILECs and CLECs differently violates the letter and spirit of section 253(c). Such treatment is discriminatory, because dominant incumbents are exempted. It is not competitively neutral because the cost of providing service for TCG and other new entrants will be "artificially higher, without regard to their comparative efficiency, thus putting TCG at a competitive disadvantage. Finally, as to section 253(a), TCG argues that since the ordinance provides criminal penalties for noncompliance, there is a prohibition on entry.

The state claims were eventually decided in favor of TCG on March 8, 1999 where the state court held Dearborn had indeed violated Michigan state law. TCG Detroit v. City of Dearborn, No. 98-803837 (Wayne Co.Cir.Ct. filed Mar. 8, 1999) discussed below.

9. BellSouth Telecommunications v City of Seneca, No. 8:98-3451-13 (D.S.C. filed April 28, 1999) (Tax Injunction Act does not divest court of jurisdiction where state fails to provide "plain, speedy, and efficient remedy.") The court denied the City's motion to dismiss for lack of subject matter jurisdiction. The court held the Tax Injunction Act only applies if a "plain, speedy, and efficient remedy" is available in state court. To provide a sufficient remedy, the state must provide taxpayers with a hearing where taxpayers may obtain a judicial determination on constitutional claims. The opportunity to contest must be a

meaningful one. South Carolina has no such procedure.

South Carolina here did have a refund procedure which replaced its earlier pay-under-protest procedure for certain taxes. It did not apply to municipal taxes. The statute also provided there was to be no other remedy to contest taxes. Judicial action was even barred. The state argued, however, that the statute's inapplicability to municipal taxes meant that declaratory relief must implicitly be available in a state court. The court stated that, at best, the state's argument meant there was an uncertainty as to the availability of a remedy. Since there was no "plain, speedy, and efficient remedy" within the meaning of the Tax Injunction Act, the court would have subject matter jurisdiction.

10. Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, No. CCB-98-4187, 1999 U.S. Dist. LEXIS (D. Md May 24, 1999) (In 1998, Prince George's County adopted a telecommunications ordinance that imposed onerous franchising and regulatory requirements on telecommunications services providers in the County. The Ordinance contained the following provisions: i) all providers, including resellers, must obtain a County franchise; ii) All providers, including resellers, must pay a franchise fee of 3% of gross revenues (including revenues of affiliates) to the County; iii) franchise applications must provide detailed information regarding engineering, ownership, a description of the services, financial information, and any additional information that the County requests; iv) the County may consider the "managerial, technical, financial and legal qualifications," the nature of the proposed facilities and services, the applicant's record of right-of-way use in other communities, whether the

application will serve the public interest, and such other factors as the County deems appropriate; v) franchisees must provide services, facilities, and equipment to the County free of charge; and vi) the County must approve transfers, including changes of control based on sale of stock. Based on a complaint filed by Bell Atlantic, the district court held that the County's Ordinance and requirements constituted a "barrier to entry" in violation of Section 253 of the Communications Act. Notably, the court is the first to explicitly hold that a franchise fee based on a percentage of gross revenues constitutes an unlawful economic barrier to entry. The court reasoned that because the County's 3% franchise fee was not directly related to the companies' use of the public rights-of-way, and was not set at a level designed to compensate the County for its actual costs of administration, it was a barrier to entry in violation of Section 253. In so holding, the court rejected the TCG Detroit v. City of Dearborn federal court decision (on appeal) that had upheld a 4% franchise fee. The Maryland court found that the *Dearborn* decision failed to consider the pro-competitive, de-regulatory policies underlying the Telecommunications Act of 1996 generally, and Section 253 in particular. By holding that a violation of Section 253(c) is also a violation of 253(a), the question of whether there is federal jurisdiction over 253(c) claims is now solved by pleading that both 253(a) (where jurisdiction is not questioned) and 253(c) have been violated.

The court preempted the ordinance in its entirely and enjoined the County from enforcing any aspect of the ordinance. The court also adopted a narrow definition of the scope of permissible municipal right-of-way "management," and thus follows the trend set by other decisions, including AT&T Communications of the Southwest, Inc. v. City of Dallas, BellSouth Telecommunications v. City of Coral Springs, AT&T Communications of the Southwest, Inc. v. City of Austin, and the FCC in Classic Telephone and TCI Cablevision of Oakland County. Looking to the FCC's *Classic* decision, the court found that permissible "management" activities include: "regulat[ing] the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts; requiring underground versus overhead construction; requiring a company to pay fees to recover an appropriate share of increased street paving costs; enforcing local zoning regulations; and requiring indemnification of the City against claims arising from the company's excavation. The court further held that resellers cannot be subject to any regulation by local authorities under the guise of "right-of-way management." [U]nless a telecommunications company...physically impacts the public rights-of-way by installing, modifying, or removing telecommunications lines and facilities, it is not 'using' the rights-of-way...and the County may not charge it a franchise fee." This approach should prevent local franchising authorities from attempting to "franchise" the provision of telecommunications over a cable system's existing dark fiber.

**C. State Court Decisions**

1.City of Hawarden v. US West Communications, Inc., 1999 Iowa Sup. LEXIS 73 (Iowa Mar. 24, 1999)(ordinance requiring three percent gross revenue "user fee" from nonmunicipal utility is unlawful tax to the extent it exceeds regulatory costs, contrary to state laws granting CPCN and statutory easements, and contrary to

FTA).

Hawarden assessed a percentage of revenue fee for use of public property, including utility rights-of-way. However, city utilities were exempt. US West sued. US West argued that while cities could regulate utility use of rights-of-way and even charge fees to cover administrative costs, to the extent these fees exceeded administrative costs, they were unlawful taxes. US West also claimed the ordinance conflicted with state laws which provided US West a CPCN to operate throughout the state and easements to install facilities on public rights-of-way. US West also claimed the different treatment of city utilities violated section 253(c). The Iowa Supreme Court agreed with US West stating: To the extent...[the ordinance] purports to require a revenue-based "user fee" as a prerequisite to providing telephone service in Hawarden, it conflicts with Iowa Code sections 476.29(6), 477.1 and.3, as well as the Telecommunications Act of 1996. Section 476.29(6) states that the "only" authority required for a utility to provide local telephone service is a certificate of public convenience and necessity, with tariffs approved by the Iowa utility Board. Section 477.1 grants the utility an easement to install its equipment along public roads, while subsection (3) directs payment to such easements when installation occurs on private property. Whereas ordinance 549 purports to exempt city utilities from paying the user fee imposed on private entities, the federal act requires that any fees exacted from telecommunications providers be "competitively neutral and non-discriminatory.

2. Iowa Telephone Association v. City of Hawarden, 589 N.W.2d 245 (Iowa 1999)

(47 U.S.C. § 541(b) prevents states from prohibiting a city, which is a cable operator, from providing telecommunications). Hawarden passed a measure authorizing the city to form a utility to provide a cable system. The Iowa Telephone Association, an association of wireline providers, sought declaratory relief claiming that Iowa law did not allow cities to operate "telephone systems." The Supreme Court disagreed. It acknowledged that the City of Abilene decision meant that Iowa could pass a law prohibiting cities from offering telecommunications services. In this case, however, Hawarden had been authorized by the state to operate a cable system. Because Hawarden qualified as a cable operator under federal law. It was protected by 47 U.S.C. §541(b)(3)(B) which provides that franchising authorities may not impose requirements that have the purpose and effect of "prohibiting...the provision of telecommunications services by a 'cable operator."

3. TCG Detroit v. City of Dearborn, No. 98-803837 (Wayne Co.Cir.Ct. filed Mar 8, 1999). The federal court remanded state claims as more appropriate for resolution in state court. Under the Michigan Telecommunications Act, local municipalities were required to grant access permits to use rights-of-way to telecommunications service providers. Sections 251-253 of the Michigan law only allowed cities to review and restrict access to protect the health, safety, and welfare of the public. The law provided mandatory processing times, provided that access and use should not be unreasonably denied; provided for bonding not to exceed reasonable restoration costs; provided that permits should be issued on a nondiscriminatory basis; and provided that fees should not exceed

the "fixed and variable costs" to cities incurred in granting permits and maintaining rights-of-way.

TCG raised several claims, including violations of sections 251-253 of the Michigan Act. Dearborn moved for summary judgment claiming, among other things, that the new Act unlawfully infringed upon its constitutional consent and franchise powers. The court held the law to be constitutional.

There was also a state Equal Protection claim raised by TCG. The court found it to be res judicata, because it was essentially the same as the federal Equal Protection claim decided by the federal court. The court further noted, however, that the equal protection claim was under appeal in the federal decision. Wayne County Circuit Judge Battani issued an Opinion and entered an Order on June 11, 1999 regarding Dearborn=s Motion for Partial Reconsideration of the Court=s March 8, 1999 Opinion and Order upholding the constitutionality of the Michigan Telecommunications Act (AMTA@) and TCG Detroit=s Motion for Summary Disposition. The Court denied Dearborn=s Motion for Partial Consideration noting that Dearborn=s arguments raised the same subject matter that the Court had previously ruled on. Thus, the Court again rejected Dearborn=s constitutional challenge premised on Article 7, Section 29 of the Michigan Constitution.The vast majority of the Court=s 37 page Opinion dealt with TCG Detroit=s Motion for Summary Disposition. The Court determined that the compensation provisions of the draft franchise agreement were illegal including '2.1 requiring a 4% franchise fee; '2.2 requiring certifications of franchise fee calculations; '2.4 requiring franchise payment audits; '2.5

requiring Amost favored nations@ treatment; '3.1a requiring free emergency communications interconnection; '5.2 requiring a $50,000 one-time fee; '5.3 requiring services to the City at TCG Detroit=s lowest rate; '5.4 requiring free facilities to the City; '5.5 requiring free emergency use of TCG Detroit facilities; and '8.2 requiring the filing of TCG Detroit financial statements. These sections of the draft agreement were determined to be in violation of the Afixed and variable costs@ limitation of '253 of the MTA. In addition, the Court concluded that certain of the compensation provisions above and '' 9.1, 9.2, and 9.6 (erroneously cited as '9.7 in the Opinion and Order) of the draft agreement, which sections attempted to impose certain transfer restrictions on TCG Detroit, involved matters exclusively delegated to the MPSC and/or were unrelated to the City=s right to manage its rights-of-way. Although striking down the specific compensation sections of the draft agreement, the Court upheld the vague compensation directives of ''1.9 (compensation shall be Aas public interest may require@) and 1.10 (franchise fee shall be negotiated Abased upon the value of services for similar agreements and other pertinent factors@) of the ordinance. In upholding those provisions, the Court determined that the ordinance was a legislative act which must be construed, if possible, to preserve its validity. Therefore, the Court concluded that these vague provisions must refer to or inherently incorporate the Afixed and variable costs@ limitation. Other TCG Detroit arguments regarding the illegality of various sections of the ordinance and draft agreement were rejected by the Court. Specifically, the Court determined that TCG Detroit=s discrimination argument would be rejected because of an alleged failure to show that TCG Detroit is similarly situated to Ameritech; the ordinance may require a Afranchise,@ as opposed to an MTA Apermit,@ since those terms are functionally equivalent; and the ordinance does not impose a tax since, as construed by the Court, compensation is limited to Dearborn=s Afixed and variable costs.@Dearborn is required to file and serve its Afixed and variable costs@ analysis by July 30, 1999. The Court=s Opinion should prevent Dearborn from attempting to pursue any exotic interpretations of the MTA=s Afixed and variable costs@ limitation. For example, the Court specifically rejected Dearborn=s arguments that compensation, if reasonable, prevents a court from looking behind the methodology used to establish the compensation; compensation may be established based upon the Afair market rental value@ of a municipality=s rights-of-way; and a percent of a telecommunications provider=s revenues may be used as a Aproxy@ for a municipality=s Afixed and variable costs.@ It is anticipated, however, that Dearborn will attempt to allocate an unreasonable amount of its total expenditures in determining its Afixed and variable costs@ attributable to use of its rights-of-way by telecommunications providers.

4.City of Chattanooga v. BellSouth, No. 96-CV-1155 (Hamilton Co. Cir. Ct., filed Jan. 4, 1999.)(fees deposited in general revenue fund, assessed without regard to actual cost and not reasonably to regulatory costs, are unlawful taxes.) The court stated that a city may act in proprietary and governmental capacities. In a proprietary capacity, a city may charge rent. Where a city acts in its governmental capacity, it can regulate, but only in furtherance of its police power.

Under Tennessee law, police power regulation may even intrude upon a statewide franchise. When acting in its governmental capacity, the city may charge fees but only to defray regulatory costs; these fees must bear a reasonable relationship to the activity being regulated and must not be disproportionate to expenses incurred. The court believed the fees in this case, if considered rent, would conflict with the BellSouth's statewide franchise. They also qualified as regulatory fees, and since such fees were in excess of the costs of regulation, they constituted an unlawful tax.

5.U.S. West Communications, Inc. v. City and County of Denver, No.98CV-691 (Denver City and Co.Ct. Mar 5, 1999). The court found that Denver's ordinance imposing franchise fees on US West conflicted with state constitutional provisions prohibiting cities from exercising police powers in a manner that infringed upon the provider's right to provide "pre-existing" service, as opposed to providing new facilities or service. The ordinance also conflicted with US West's statewide franchise and C.R.S. 28-55-102(b) which provides that no further local authorization or franchise is required for telecommunications providers to conduct business in a municipality.

6. AT&T Communications of the Northwest and AT&T Wireless v. City of Eugene **[site]** AT&T Communications of the Northwest, AT&T Wireless, TCI, US West and Sprint PCS challenged the City of Eugene, Oregon's ordinance which imposed a registration requirement, two percent fee on all persons engaged in "telecom activity" (including cable companies engaged in the provision of cable service), a license requirement and an additional seven percent fee on a such

persons using the public rights-of-way (including resellers). AT&T moved for summary judgment, arguing that the ordinance violated section 253 of the Federal Act and sought a declaratory ruling that the ordinance was invalid and an injunction against the City's further enforcement of the measure. Ruling from the bench, the judge granted AT&T's motion.

7. AT&T v. City of Denver **[site]**

AT&T challenged an ordinance adopted by the city that would, among other things, require telecom providers that use the rights-of-way to compensate the City based on a percent of revenue. AT&T challenged the ordinance in state court and was granted judgment on the pleadings in March 1999 based on the following counts: the ordinance violated state rights-of-way law, and it amounted to an improper franchise, in violation of state statute and case law. The Judge scheduled a trial on damages.

8. TSC v. City and County of San Francisco

TCI's subsidiary, TSC, which holds the cable franchise in the city and county of San Francisco, brought suit in May 1999 against the city and county seeking to enjoin or be exempted from the CCSF's recently adopted Excavation Code and the Regulation (street cut ordinance). The Ordinance imposes a number of significant preconditions and/or limitations on TSC's ability to construct its cable system in the rights-of-way including, without limitation, the following: (a) CCSF requires TSC to pave large areas of streets unaffected by the excavation; (b) CCSF prohibits TSC from excavating certain streets for a period of five years; and (c) CCSF imposes unreasonable burdens and unnecessary trench backfilling and repaving requirements; and (d) CCSF imposes joint excavation requirements which substantially interfere with TSC's ability to install, repair and maintain its cable television systems. TSC contends that CCSF's enactment of the Excavation Code and the Regulation, including the excavation fee and excavation-related preconditions and/or limitations, constitutes a breach of the Franchise with TCI; a breach of the implied covenant of good faith and fair dealing contained in the Franchise; an improper unilateral modification of the Franchise; an unconstitutional impairment of contract; a violation of 47 U.S.C. § 542; a violation of the Contracts Clauses of the United States and California constitutions, respectively; and violations of the Takings and Due Process Clauses of the United States and California Constitutions, respectively. In addition, CCSF's imposition, without the approval of two-thirds of its voters, is effectively is an unauthorized tax on its franchisees, and violates Article 13 of the California Constitution.

9. <u>Alachua County v. State of Florida</u>, ([cite]May 13, 1999) The Alachua County Electric Utility Privilege Fee Ordinance imposed a monthly fee on electric utilities for the "privilege" of using county rights-of-way to deliver electricity to consumers in Alachua County. The court held that the Privilege Fee is not related to Alachua County's costs regulating the use by electric utilities of the county rights-of-way and is not related to the cost of maintaining the portion of county rights-of-way occupied by electric utilities. "This court has held that cities have the power "to impose a charge for the use and occupation of the streets by [a utility company] embraced in the power given to the city to regulate its streets." The court stated

that local governments have the authority to require that utilities be licensed pursuant to their police power, and that governments may require a reasonable fee to cover the cost of regulation. The court cited City of Chattanooga V. BellSouth Telecommunications, Inc. 1 F. Supp. 2d 809 (E.1) Tenn. 1998), for the proposition that a franchise or "rental" fee as general revenue was an indication of the fee being a tax rather than rent. The court held that it was undisputed that revenue was to be deposited in the general revenue fund and used, among other ways, to provide tax relief to taxpayers, a uniquely governmental use of funds, making it an unlawful tax.

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only allowed cities to review and restrict access to protect the health, safety, and welfare of the public. The law provided mandatory processing times, provided that access and use should not be unreasonably denied; provided for bonding not to exceed reasonable restoration costs; provided that permits should be issued on a nondiscriminatory basis; and provided that fees should not exceed the "fixed and variable costs" to cities incurred in granting permits and maintaining rights-of-way.

TCG raised several claims, including violations of sections 251-253 of the Michigan Act. Dearborn moved for summary judgment claiming, among other things, that the new Act unlawfully infringed upon its constitutional consent and franchise powers. The court held the law to be constitutional.

There was also a state Equal Protection claim raised by TCG. The court found it to be res judicata, because it was essentially the same as the federal Equal Protection claim decided by the federal court. The court further noted, however, that the equal protection claim was under appeal in the federal decision. Wayne County Circuit Judge Battani issued an Opinion and entered an Order on June 11, 1999 regarding Dearborn=s Motion for Partial Reconsideration of the Court=s March 8, 1999 Opinion and Order upholding the constitutionality of the Michigan Telecommunications Act (AMTA@) and TCG Detroit=s Motion for Summary Disposition. The Court denied Dearborn=s Motion for Partial Consideration noting that Dearborn=s arguments raised the same subject matter that the Court had previously ruled on. Thus, the Court again rejected Dearborn=s constitutional challenge premised on Article 7, Section 29 of the

Michigan Constitution.The vast majority of the Court=s 37 page Opinion dealt with TCG Detroit=s Motion for Summary Disposition. The Court determined that the compensation provisions of the draft franchise agreement were illegal including '2.1 requiring a 4% franchise fee; '2.2 requiring certifications of franchise fee calculations; '2.4 requiring franchise payment audits; '2.5 requiring Amost favored nations@ treatment; '3.1a requiring free emergency communications interconnection; '5.2 requiring a $50,000 one-time fee; '5.3 requiring services to the City at TCG Detroit=s lowest rate; '5.4 requiring free facilities to the City; '5.5 requiring free emergency use of TCG Detroit facilities; and '8.2 requiring the filing of TCG Detroit financial statements. These sections of the draft agreement were determined to be in violation of the Afixed and variable costs@ limitation of '253 of the MTA. In addition, the Court concluded that certain of the compensation provisions above and '' 9.1, 9.2, and 9.6 (erroneously cited as '9.7 in the Opinion and Order) of the draft agreement, which sections attempted to impose certain transfer restrictions on TCG Detroit, involved matters exclusively delegated to the MPSC and/or were unrelated to the City=s right to manage its rights-of-way. Although striking down the specific compensation sections of the draft agreement, the Court upheld the vague compensation directives of ''1.9 (compensation shall be Aas public interest may require@) and 1.10 (franchise fee shall be negotiated Abased upon the value of services for similar agreements and other pertinent factors@) of the ordinance. In upholding those provisions, the Court determined that the ordinance was a legislative act which must be construed, if possible, to preserve its validity.

Therefore, the Court concluded that these vague provisions must refer to or inherently incorporate the Afixed and variable costs@ limitation. Other TCG Detroit arguments regarding the illegality of various sections of the ordinance and draft agreement were rejected by the Court. Specifically, the Court determined that TCG Detroit=s discrimination argument would be rejected because of an alleged failure to show that TCG Detroit is similarly situated to Ameritech; the ordinance may require a Afranchise,@ as opposed to an MTA Apermit,@ since those terms are functionally equivalent; and the ordinance does not impose a tax since, as construed by the Court, compensation is limited to Dearborn=s Afixed and variable costs.@Dearborn is required to file and serve its Afixed and variable costs@ analysis by July 30, 1999. The Court=s Opinion should prevent Dearborn from attempting to pursue any exotic interpretations of the MTA=s Afixed and variable costs@ limitation. For example, the Court specifically rejected Dearborn=s arguments that compensation, if reasonable, prevents a court from looking behind the methodology used to establish the compensation; compensation may be established based upon the Afair market rental value@ of a municipality=s rights-of-way; and a percent of a telecommunications provider=s revenues may be used as a Aproxy@ for a municipality=s Afixed and variable costs.@ It is anticipated, however, that Dearborn will attempt to allocate an unreasonable amount of its total expenditures in determining its Afixed and variable costs@ attributable to use of its rights-of-way by telecommunications providers.

4.City of Chattanooga v. BellSouth, No. 96-CV-1155 (Hamilton Co. Cir. Ct., filed

Jan. 4, 1999.)(fees deposited in general revenue fund, assessed without regard to actual cost and not reasonably to regulatory costs, are unlawful taxes.) The court stated that a city may act in proprietary and governmental capacities. In a proprietary capacity, a city may charge rent. Where a city acts in its governmental capacity, it can regulate, but only in furtherance of its police power. Under Tennessee law, police power regulation may even intrude upon a statewide franchise. When acting in its governmental capacity, the city may charge fees but only to defray regulatory costs; these fees must bear a reasonable relationship to the activity being regulated and must not be disproportionate to expenses incurred. The court believed the fees in this case, if considered rent, would conflict with the BellSouth's statewide franchise. They also qualified as regulatory fees, and since such fees were in excess of the costs of regulation, they constituted an unlawful tax.

5. U.S. West Communications, Inc. v. City and County of Denver, No.98CV-691 (Denver City and Co.Ct. Mar 5, 1999). The court found that Denver's ordinance imposing franchise fees on US West conflicted with state constitutional provisions prohibiting cities from exercising police powers in a manner that infringed upon the provider's right to provide "pre-existing" service, as opposed to providing new facilities or service. The ordinance also conflicted with US West's statewide franchise and C.R.S. 28-55-102(b) which provides that no further local authorization or franchise is required for telecommunications providers to conduct business in a municipality.

6. AT&T Communications of the Northwest and AT&T Wireless v. City of Eugene

**[site]** AT&T Communications of the Northwest, AT&T Wireless, TCI, US West and Sprint PCS challenged the City of Eugene, Oregon's ordinance which imposed a registration requirement, two percent fee on all persons engaged in "telecom activity" (including cable companies engaged in the provision of cable service), a license requirement and an additional seven percent fee on a such persons using the public rights-of-way (including resellers). AT&T moved for summary judgment, arguing that the ordinance violated section 253 of the Federal Act and sought a declaratory ruling that the ordinance was invalid and an injunction against the City's further enforcement of the measure. Ruling from the bench, the judge granted AT&T's motion.

7. <u>AT&T v. City of Denver</u> **[site]**

AT&T challenged an ordinance adopted by the city that would, among other things, require telecom providers that use the rights-of-way to compensate the City based on a percent of revenue. AT&T challenged the ordinance in state court and was granted judgment on the pleadings in March 1999 based on the following counts: the ordinance violated state rights-of-way law, and it amounted to an improper franchise, in violation of state statute and case law. The Judge scheduled a trial on damages.

8. <u>TSC v. City and County of San Francisco</u>

TCI's subsidiary, TSC, which holds the cable franchise in the city and county of San Francisco, brought suit in May 1999 against the city and county seeking to enjoin or be exempted from the CCSF's recently adopted Excavation Code and the Regulation (street cut ordinance). The Ordinance imposes a number of significant preconditions and/or limitations on TSC's ability to construct its cable system in the rights-of-way including, without limitation, the following: (a) CCSF requires TSC to pave large areas of streets unaffected by the excavation; (b) CCSF prohibits TSC from excavating certain streets for a period of five years; and (c) CCSF imposes unreasonable burdens and unnecessary trench backfilling and repaving requirements; and (d) CCSF imposes joint excavation requirements which substantially interfere with TSC's ability to install, repair and maintain its cable television systems. TSC contends that CCSF's enactment of the Excavation Code and the Regulation, including the excavation fee and excavation-related preconditions and/or limitations, constitutes a breach of the Franchise with TCI; a breach of the implied covenant of good faith and fair dealing contained in the Franchise; an improper unilateral modification of the Franchise; an unconstitutional impairment of contract; a violation of 47 U.S.C. § 542; a violation of the Contracts Clauses of the United States and California constitutions, respectively; and violations of the Takings and Due Process Clauses of the United States and California Constitutions, respectively. In addition, CCSF's imposition, without the approval of two-thirds of its voters, is effectively is an unauthorized tax on its franchisees, and violates Article 13 of the California Constitution.

9. Alachua County v. State of Florida, ([cite]May 13, 1999) The Alachua County Electric Utility Privilege Fee Ordinance imposed a monthly fee on electric utilities for the "privilege" of using county rights-of-way to deliver electricity to consumers in Alachua County. The court held that the Privilege Fee is not related to Alachua

County's costs regulating the use by electric utilities of the county rights-of-way and is not related to the cost of maintaining the portion of county rights-of-way occupied by electric utilities. "This court has held that cities have the power "to impose a charge for the use and occupation of the streets by [a utility company] embraced in the power given to the city to regulate its streets." The court stated that local governments have the authority to require that utilities be licensed pursuant to their police power, and that governments may require a reasonable fee to cover the cost of regulation. The court cited City of Chattanooga V. BellSouth Telecommunications, Inc. 1 F. Supp. 2d 809 (E.1) Tenn. 1998), for the proposition that a franchise or "rental" fee as general revenue was an indication of the fee being a tax rather than rent. The court held that it was undisputed that revenue was to be deposited in the general revenue fund and used, among other ways, to provide tax relief to taxpayers, a uniquely governmental use of funds, making it an unlawful tax.